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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

PERFECT 10, INC., a California corporation,

| Case No.: 11-cv-07098-AB (SHx)

Plaintiff,

V.

GIGANEWS, INC., a Texas Corporation; LIVEWIRE SERVICES, INC., a Nevada corporation; and DOES 1 through 100, inclusive,

**DEFENDANT GIGANEWS, INC.’S
OPPOSITION TO PERFECT 10, INC.’S
MOTION FOR RECONSIDERATION
OF THIS COURT’S ORDER (1)
GRANTING DEFENDANT GIGANEWS,
INC.’S MOTION FOR PARTIAL
SUMMARY JUDGMENT ON THE
ISSUE OF INDIRECT COPYRIGHT
INFRINGEMENT (DKT. 440) AND (2)
DENYING AS MOOT PLAINTIFF’S
MIRROR-IMAGE MOTION FOR
PARTIAL SUMMARY JUDGMENT ON
THE ISSUE OF INDIRECT
COPYRIGHT INFRINGEMENT
(DKT. 467) (DKT. 620)**

GIGANEWS, INC., a Texas Corporation; LIVEWIRE SERVICES, INC., a Nevada Corporation.

Counterclaimants,

V.

PERFECT 10, INC., a California Corporation.

Date: December 29, 2014

Time: 10:00 a.m.

Courtroom: 790 Roybal

Judge: Hon. André Birotte

Judgment Entered: November 26, 2014

DEF. GIGANEWS, INC.'S OPP. TO P10'S MTN.
FOR RECON. OF ORDER GRANTING SUMMARY
JUDGMENT RE INDIRECT INFRINGEMENT

CASE NO. 11-cv-07098-AB (SHx)

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1 **I. INTRODUCTION**

2 Perfect 10 tries, yet again, to undo decisions of this Court. Dissatisfied with
 3 its long string of losses before three different district judges and one magistrate
 4 judge of this Court (after losing a venue change motion that it fought in the
 5 Southern District of California), Perfect 10 again tries to pin the blame for its losses
 6 on the Court instead of on its own practices. Perfect 10's motion for
 7 reconsideration, like its entire litigation history in this case and its gotcha-litigation
 8 business model, reeks of bad faith. Perfect 10's flawed arguments fall into three
 9 basic categories, of which none meets the heavy burden to establish sufficient
 10 grounds for reconsideration:

- 11 1. Arguments that Perfect 10 raised in its opposition to Giganews's motion for
 12 partial summary judgment regarding indirect infringement, which are not
 13 proper to relitigate on reconsideration;
- 14 2. Arguments that were available to Perfect 10 but which Perfect 10 failed to
 15 raise in its opposition to Giganews's motion for partial summary judgment
 16 regarding indirect infringement, which are not proper to raise for the first
 17 time on reconsideration; and
- 18 3. Factual evidence that the Court considered in connection with its Order,
 19 which the Court correctly decided.

20 At the root of most of Perfect 10's reconsideration arguments are 9 sample DMCA
 21 notices that Perfect 10 identified and that the Court properly found inadequate,
 22 including Sample Notices 1-5 (Screenshot/search notices), Sample Notices 6-8
 23 (illegible faxed notices that required Giganews to perform searches), and Sample
 24 Notice A (a notice that did not identify Message-IDs). Perfect 10's motion for
 25 reconsideration failed to identify any material facts it properly raised that the Court
 26 failed to consider, or any clear error by the Court. The Court should therefore
 27 summarily deny Perfect 10's motion in its entirety.

1 **II. ARGUMENT**

2 **A. Legal Standard.**

3 To prevail on a motion for reconsideration, the movant must meet a heavy
 4 burden. “Motions for reconsideration are disfavored and are rarely granted.”
 5 *Collins v. U.S. Citizenship & Naturalization Serv.*, No. CV 11-9909-JFW, 2013 WL
 6 776244, at *1 (C.D. Cal. Feb. 6, 2013) (internal quotation and citation omitted). A
 7 “motion for reconsideration should not be granted, *absent highly unusual*
 8 *circumstances*, unless the district court is presented with newly discovered
 9 evidence, committed clear error, or if there is an intervening change in the
 10 controlling law.” *389 Orange St. Partners v. Arnold*, 179 F.3d 656, 665 (9th Cir.
 11 1999) (applying Rule 59(e)) (emphasis added). “While Rule 59(e) permits a district
 12 court to reconsider and amend a previous order, the rule offers an ‘extraordinary
 13 remedy, to be used sparingly in the interests of finality and conservation of judicial
 14 resources.’” *Carroll v. Nakatani*, 342 F.3d 934, 945 (9th Cir. 2003) (quoting 12
 15 James Wm. Moore et al., *Moore’s Federal Practice* § 59.30[4] (3d ed.2000)).
 16 “Likewise, Local Rule 7–18 sets forth these same three *narrow* grounds as the *only*
 17 basis on which a motion for reconsideration should be granted.” *Hendrix v.*
 18 *Novartis Pharms. Corp.*, No. CV-14-3856-MWF, 2014 WL 4090840, at *2 (C.D.
 19 Cal. Aug. 19, 2014) (emphases added).

20 A motion for reconsideration is not a vehicle for relitigating arguments that
 21 the court considered and rejected. *Stern v. Cingular Wireless Corp.*, No. CV 05-
 22 8842 CAS, 2008 WL 4534048, at *4 (C.D. Cal. Oct. 6, 2008) (denying motion to
 23 reconsider class certification order where defendants had “done little more than
 24 rehash their prior arguments”). Indeed, the rule is clear that “[n]o motion for
 25 reconsideration shall in any manner repeat any oral or written argument made in
 26 support of or in opposition to the original motion.” L.R. 7-18(c); *see also Nat'l*
 27 *Union v. Wells Fargo Bank*, No. CV 03-02452-NM, 2005 WL 6524450, at *3 (C.D.
 28 Cal. June 24, 2005) (“Plaintiff improperly attempts to use its motion for

1 reconsideration to relitigate these claims, repeating many of the same arguments
 2 previously made in its briefs opposing Defendant's motion for summary
 3 judgment."); *Vita-Herb Nutriceuticals, Inc. v. Probiohealth, LLC*, No. SACV 11-
 4 1463 DOC, 2013 WL 271713, at *3 (C.D. Cal. Jan. 23, 2013) ("The Court
 5 considered, and rejected, Plaintiff's argument in its original form, and it similarly
 6 rejects Plaintiff's argument now."); *Aventis Pharms SA v. Amphastar Pharms., Inc.*, Nos. ED CV 03-887 RT, ED CV 04-333, 2005 WL 5957795, at *2 (C.D. Cal.
 7 Mar. 25, 2005) (rejecting motion to reconsider order disqualifying expert witness
 8 where movant "merely repeat[ed] an argument it raised in its Opposition to the
 9 Original Motion").

11 Nor are motions for reconsideration "to be used to test new legal theories that
 12 could have been presented when the original motion was pending." *See Collins*,
 13 2013 WL 776244, at *1 (citation omitted); *see also Carroll*, 342 F.3d at 945
 14 (affirming denial of motion for reconsideration of summary judgment motion
 15 because the motion "may not be used to raise arguments or present evidence for the
 16 first time when they could reasonably have been raised earlier in the litigation").

17 Unable to present newly discovered evidence or any intervening change in
 18 controlling law, Perfect 10 now attempts to relitigate old arguments and raised new
 19 legal theories in its motion for reconsideration, audaciously framing these issues as
 20 this Court's failure to consider material facts. Perfect 10's motion for

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1 reconsideration is procedurally improper and substantively meritless; the Court
 2 should therefore entirely deny it.¹

3 **B. The Court Did Not Commit a Clear Error by Finding That**
 4 **Giganews Promptly Blocked All Legible Message-IDs in Proper**
 5 **Notices.**

6 The evidence that Perfect 10 cited in support of its assertion that “the Court
 7 incorrectly found that Giganews promptly blocked all legible Message-IDs”
 8 (Motion at 8) consists *exclusively* of two types of DMCA notices—Screenshot
 9 DMCA notices² and faxed DMCA notices. But the Court *explicitly* considered each
 10 type of notice and rejected them as improper. Indeed, the Court found that these
 11 types of DMCA notices did not confer knowledge—actual or constructive—on
 12 Giganews. Order at 12-13. As the Court correctly found:

13 In short, there is no evidence that Giganews had any

15 ¹ Perfect 10 stated that its motion is based on the Court’s “fail[ure] to consider
 16 various material facts presented by Perfect 10” (Motion at 8:2), not any other bases
 17 for reconsideration. Citing case law that reconsideration is appropriate where the
 18 district court “committed clear error or the initial decision was manifestly unjust”
 19 (Motion at 7:21-24), Perfect 10 nevertheless attempted to argue that “*to avoid*
 20 *manifest injustice*, it is imperative that the Court’s Order properly reflect the
 21 evidence presented by Perfect 10.” *Id.* at 7:14-16 (emphasis added). And this is
 22 because “Defendants are preparing to file a motion seeking to recover millions of
 23 dollars in attorneys’ fees.” *Id.* at 7:13-14. Perfect 10’s new motion will only add to
 24 the attorney’s fees that Defendants will seek. In any event, Perfect 10’s argument is
 25 illogical and confuses the governing standard. Whether Defendants are entitled to
 26 attorneys’ fees and the amount of fees are entirely irrelevant to whether this Court’s
 27 Order was manifestly unjust. Perfect 10 failed to advance any compelling
 28 arguments that the Court committed clear error or that the Order was unjust.

25 ² Perfect 10 conceded that its evidence includes screenshot takedown notices.
 26 Motion at 9 n.1. Perfect 10, however, tried to confuse the issue by claiming the
 27 only way it could show that Message-IDs had not been removed is to take
 28 screenshots, while failing to mention that its initial method of notifying Giganews
 29 of these Message-IDs was through screenshot notices—evidence that this Court
 30 considered and found inadequate.

knowledge, actual or constructive, of any specific infringing content other than those messages for which Perfect 10 provided legible Message IDs. *As to those messages*, the evidence is undisputed that Giganews promptly blocked access to the infringing messages.

Id. at 13 (emphasis added). Perfect 10’s accusation that “the Court appeared to overlook Perfect 10 evidence that Giganews did not, in fact, block *all* emailed Message-IDs” (Motion at 8:18-19 (emphasis added)) misstates the Court’s findings and the legal requirements. As the Court correctly concluded, the law required Giganews to block all *legible* Message-IDs in proper notices and Giganews properly did so. Order at 13 (“Indeed, pursuant to such requests, Giganews blocked access to more than a half-a-billion individual messages . . .”). Contrary to Perfect 10’s argument, the law did not require Giganews to remove *all* Message-IDs, as it could not remove those that were not legible and need not remove those contained in notices that the Court found inadequate: “[T]akedown notices that do not substantially comply with the requirements set forth in the DMCA” shall not be considered in determining knowledge or triggering prompt removal. Order at 10-11. The Court discussed in detail Perfect 10’s screenshot notices and illegible faxed notices (Order at 10-13) and determined that none of them complied with the requirements for a DMCA takedown notice:

- “Perfect 10’s practice of sending Giganews screenshots of a newsreader window along with instructions ‘to conduct searches’ . . . fails to substantially comply with the requirements for a DMCA takedown notice.” Order at 11.
- “Perfect 10 attempts to create a disputed issue of fact on this point by identifying . . . Message-ID’s [sent] by faxing screen printouts with the Message-ID in small text, which is illegible.” Order at 12 (finding that even though Giganews responded to the faxed screenshots by expressly requesting

1 legible Message IDs, “Perfect 10 refused to provide the original digital files
 2 it admits it had on file”).

3 Based on these detailed and well-reasoned findings, the Court properly concluded:

4 But Perfect 10 did not take that simple step to protect its
 5 copyrights. Instead, it sent Giganews hundreds of
 6 inadequate screenshot-search takedown notices that
 7 largely failed to provide Giganews with ‘information
 8 reasonably sufficient to permit the service provider to
 9 locate the [allegedly infringing] material.’ 17 USC
 10 § 512(c)(3)(A)(iii). Such ‘deficient notifications shall not
 11 be considered in determining whether [Giganews] ha[d]
 12 actual or constructive knowledge.’ *Viacom Int’l, Inc. v.*
 13 *YouTube, Inc.*, 940 F.Supp.2d at 115 (citing 17 U.S.C.
 14 § 512(c)(3)(B)(i).

15 Order at 13.

16 Having determined that screenshot and faxed notices did not confer actual or
 17 constructive knowledge on Giganews to allow it to promptly remove the allegedly
 18 infringing material, Perfect 10’s arguments regarding the timing of Giganews’s
 19 removal of Message-IDs in those inadequate notices are irrelevant.

20 Perfect 10 asserted that it identified three different sets of legible Message-
 21 IDs that Giganews failed to block. Motion at 10:19-20. But none of these
 22 accusations withstands scrutiny and Perfect 10 failed to establish that this Court
 23 committed a clear error:

- 24 • *First*, Perfect 10 identified “ten emailed Message-IDs” that it discussed in
 25 detail. Motion at 8:8-10:6. But each of the DMCA notices that Perfect 10
 26 cited as evidence identifying these 10 Message-IDs is a screenshot notice,
 27 which the Court considered and rejected. Order at 11-13.
- 28 • *Second*, Perfect 10 identified an email from Perfect 10’s counsel to

Giganews's counsel including "an original version of one of Perfect 10's faxed notices." Motion at 10:23-24. Perfect 10, however, did not raise this issue in its summary judgment papers regarding indirect infringement, and thus it cannot raise it on reconsideration. *Carroll*, 342 F.3d at 945 (affirming denial of motion for reconsideration because such a motion "may not be used to raise arguments or present evidence for the first time when they could reasonably have been raised earlier in the litigation").³ Even if Perfect 10 properly had raised this issue, a quick look at the evidence shows that this was not a DMCA notice at all, let alone one that meets the statutory requirements.⁴ 17 U.S.C. § 512(c)(3)(A); *see also Perfect 10 v. Google, Inc.*, No. CV 04-09484 2010 WL 9479059 (C.D. Cal. July 26, 2010).

- *Third*, Perfect 10 identified "electronic copies of 20 faxed notices containing 542 Message-IDs to counsel for Giganews on June 13, 2014, as part of a

³ Perfect 10 cited to Mr. Zada's reply declaration in support of Perfect 10's motion for partial summary judgment regarding indirect infringement (Dkt. 606-1), which discussed faxed notices and Message-IDs that he claimed were still available from those faxed notices. This declaration, however, *did not discuss* the email from Perfect 10's counsel to Giganews's counsel that purportedly attached a more legible version of a notice that Perfect 10 had earlier faxed to Giganews. The Court considered Perfect 10's illegible faxed notices—the only portion of this evidence that Perfect 10 raised in its opposition to Giganews's summary judgment motion regarding indirect infringement—and found them inadequate. Order at 12.

⁴ *See* Dkt. 442 (Declaration of Philip Molter in Support of Giganews's Motion for Partial Summary Judgment of No Liability for Indirect Copyright Infringement) ¶ 39; Dkt. 443-32 (Exhibit 25, Part 1, to the Declaration of Todd R. Gregorian in Support of Giganews's Motion for Partial Summary Judgment of No Liability for Indirect Copyright Infringement). The email from Perfect 10's counsel to Giganews's counsel (whom Giganews had not designated as its agent to receive notifications of claimed infringement under the DMCA) concerned a conference regarding the parties' planned summary judgment motions, and attached a new more legible copy of a DMCA notice that Perfect 10 had earlier faxed to Giganews. Dkt. 443-32 (Exhibit 25). Because the email attachment was not a DMCA notice from the copyright holder to Giganews, it was therefore immaterial to the Order.

1 production of documents.” Motion at 11:1-10. But Perfect 10 failed to argue
 2 that new versions of DMCA Notices that Perfect 10 produced during
 3 discovery constituted new DMCA notices that compelled Giganews to
 4 respond—even though Perfect 10 possessed this information at the time of
 5 briefing its opposition to Giganews’s summary judgment motion regarding
 6 indirect infringement. Therefore, Perfect 10 cannot raise this new argument
 7 on reconsideration. *Carroll*, 342 F.3d at 945.⁵

8 Perfect 10 failed to identify any material facts that the Court failed to consider. The
 9 Court should therefore reject Perfect 10’s arguments regarding Giganews’s removal
 10 of Message-IDs.

11 **C. The Court Did Not Commit a Clear Error by Finding That the**
 12 **Only Method for Consistently Identifying a Specific Usenet**
 13 **Message That Giganews Could Promptly Remove Is the Post’s**
 14 **Message-ID.**

15 The Court actually considered and rejected Perfect 10’s proposed alternatives
 16 to using Message-IDs, regardless of whether the Court expressly mentioned all
 17 facts that Perfect 10 now asserted in its motion for reconsideration. For example,

19 ⁵ Perfect 10 cited to Mr. Zada’s reply declaration in support of Perfect 10’s
 20 motion for partial summary judgment regarding indirect infringement. Dkt. 606-1.
 21 But again, the Court considered and rejected illegible faxed notices as inadequate.
 22 Order at 12 (specifically calling out the 542 Message-IDs contained in these
 23 inadequate notices). Further, even if the Court had not rejected Perfect 10’s faxed
 24 notices as adequate, Giganews provided evidence that the Message-IDs associated
 25 with .rar files that Perfect 10 claims it properly identified were not *in fact* identified
 26 in its fax notices. See Dkt. 618 (Giganews’s Objections to Zada’s Reply
 27 Declaration) at ¶¶ 7-8. Moreover, even if Perfect 10 had raised the argument that it
 28 provided Giganews with knowledge through DMCA notices that it produced during
 discovery, this argument would still fail; Giganews need not search through an
 entire *litigation document production* to identify and act upon “new and improved”
 copies of DMCA notices that Perfect 10 never properly sent to Giganews in the first
 instance. Defendants had not designated its litigation attorneys as agents to receive
 notifications of claimed infringement.

1 Perfect 10 argued that “carefully selected searches can be much more effective in
 2 identifying large numbers of infringing messages,” including the examples of
 3 searching for “perfecttengallery” or “P10website.” Motion at 13:24-28. Perfect 10
 4 claimed that “[t]he Court apparently failed to consider” this evidence. *Id.* But the
 5 Court considered and rejected Perfect 10’s argument that Giganews must perform
 6 searches to identify allegedly infringing content. Order at 11-12. In this regard, the
 7 Court discussed in detail how “[s]earches moments apart could yield different
 8 results,” would require “onerous side-by-side, line-by-line” comparisons, and are
 9 problematic. *Id.* at 11. The Court properly found:

10 [I]n the absence of any assurance that Giganews’ search
 11 results would yield results consistent with Perfect 10’s
 12 search, or that Perfect 10’s search results were limited to
 13 infringing material, it would be impossible [for Perfect
 14 10] to make that necessary representation [under 17
 15 U.S.C. § 512(c)(3)(A)(v)] in good faith.

16 *Id.* at 12. That the Court did not specifically mention Perfect 10’s examples of
 17 searching for the words “perfecttengallery” or “P10website” in no way proves that
 18 the Court committed a clear error when it considered and rejected Perfect 10’s
 19 argument that searches in takedown notices were proper.

20 Moreover, Perfect 10’s motion for reconsideration regarding alternatives to
 21 Message-IDs to identify allegedly infringing material rests on the following
 22 arguments and evidence that Perfect 10 raised only tangentially, citing assertions
 23 from in its supporting “Statements of Fact,” which it failed to raise in any of its

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1 briefs regarding indirect infringement, including its opposition to Giganews's
 2 motion on indirect infringement:⁶

- 3 • Message-IDs may not be available. Motion at 12:17-13:23.⁷
- 4 • Message Descriptions are a superior way of identifying messages. *Id.* at
 5 13:3-14.
- 6 • “[I]t may be impossible to determine the correct Message-ID associated with
 7 a message containing infringing Perfect 10 images when such images are
 8 mixed in with third party images in a large file.” *Id.* at 13:15-23.

9 Pointing to evidence that Perfect 10 submitted in connection with other summary
 10 judgment motions cannot justify reconsideration of the Court's Order that granted
 11 Giganews's summary judgment motion regarding indirect infringement. It is not
 12 the Court's task to “scour the record in search of a genuine issue of triable fact.”
 13 Instead, the non-moving party must “identify with reasonable particularity the
 14 evidence that precludes summary judgment.” *Keenan v. Allan*, 91 F.3d 1275, 1279
 15 (9th Cir. 1996). “The district court need not examine the entire file for evidence
 16 establishing a genuine issue of fact, where the evidence is not set forth in the

17
 18 ⁶ There can be no doubt that Perfect 10 was aware of those supposed facts
 19 because it cited to evidence that it submitted in connection with its summary
 20 judgment briefing regarding the sufficiency of its DMCA notices. *See* Motion at
 11-13.

21 ⁷ In connection with its other summary judgment motions, Defendants provided
 22 ample evidence that Message-IDs are available for all existing messages on
 23 Giganews's servers and that third-party indexes and newsreaders may show
 24 outdated lists of search results showing messages that no longer reside on
 25 Giganews's servers (*i.e.*, after the removal of messages). *See*, Dkt. 523
 26 (Giganews's Opposition to Perfect 10's Motion for Partial Summary Judgment as
 27 to the Sufficiency of DMCA Notices) at 27; Dkt. 523-1 (Declaration of Philip
 28 Molter in Support of Giganews's Opposition) at ¶ 18; Dkt. 618 (Giganews's
 Evidentiary Objections to the Reply Declaration of Norman Zada) at ¶¶ 7-8; Dkt.
 597 (Giganews's Reply Brief in Support of Motion For Partial Summary Judgment
 on the Inadequacy of Perfect 10's Notices under the Section 512 Safe Harbor) at
 14-15.

1 *opposing papers* with adequate references so that it could conveniently be found.”
 2 *Carmen v. San Francisco Unified School Dist.*, 237 F.3d 1026, 1031 (9th Cir. 2001)
 3 (emphasis added). Indeed, as Judges Posner and Easterbrook colorfully put it:
 4 “Judges are not like pigs, hunting for truffles buried in the briefs.” *United States v.*
 5 *Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991). Because Perfect 10 failed to
 6 meaningfully raise these purported facts and arguments in its motion for summary
 7 judgment on indirect infringement or its opposition to Giganews’s summary
 8 judgment motion regarding indirect infringement, they are improper on
 9 reconsideration of that motion. *Collins*, 2013 WL 776244, at *1. And, to the
 10 extent Perfect 10 raised them, the Court addressed them when it determined that
 11 “the only method for consistently identifying a specific Usenet message that
 12 Giganews could promptly remove is the post’s Message-ID.” Order at 12.

13 **D. The Court Did Not Commit a Clear Error by Overlooking Perfect**
 14 **10’s Evidence That It Was Allegedly Unaware of the Ways to**
 15 **Automatically Extract Message-IDs Automatically.**

16 Despite Perfect 10’s protests to the contrary, the Court considered Perfect
 17 10’s evidence that it was allegedly unaware of the ways to automatically extract
 18 Message-IDs automatically. The Court simply found that did not matter, and it did
 19 not shift any burden to Giganews:

- 20 • “Had Perfect 10 performed its own “investigative duties” . . . , extracted the
 21 Message-IDs, and submitted those Message-IDs to Perfect 10 in a machine
 22 readable format, there would be little left to discuss in this case.” Order at
 23 13.
- 24 • “[I]t is the law, not Giganews, that ‘place[s] the burden of . . . identifying the
 25 potentially infringing material and adequately documenting infringement . . .
 26 squarely on the owners of the copyright.’” Order at 13 (citation omitted)
 27 (emphasis in original).
- 28 • “The court declines to shift that substantial burden from the copyright owner

1 to the provider.” *Id.*

2 In fact, the Court addressed this evidence even though Perfect 10 failed to include it
 3 in its opposition to Giganews’s summary judgment motion regarding indirect
 4 infringement. Having failed properly to raise these purported facts and arguments,
 5 Perfect 10 cannot raise them now on reconsideration. *See Collins*, 2013 WL
 6 776244, at *1. Even so, the Court unquestionably *did* address Perfect 10’s
 7 argument, and rejected it.

8 **E. The Court Did Not Commit a Clear Error in Considering and
 9 Rejecting Any Requirement That Giganews Perform Searches to
 10 Identify Infringing Content.**

11 Regardless of whether Perfect 10’s “sample notices” were amenable to quick
 12 processing, the Court considered those notices and rejected Perfect 10’s assertion
 13 that Giganews is required to perform searches to identify infringing content. Order
 14 at 11-12. The Court also considered and rejected Perfect 10’s argument that
 15 Giganews could “perform searches such as “perfecttengallery” and “P10 2006” and
 16 block *all resulting messages*, not merely the identified Message IDs.” Motion at
 17 17:13-15 (emphasis in original). The Court found that under this method, “it would
 18 be impossible” for Perfect 10 to make the requisite good faith representation . . .
 19 because there is no assurance that “Giganews’ search results would yield results
 20 consistent with Perfect 10’s search, or that Perfect 10’s search results were limited
 21 to infringing material.” Order at 12. That the Court did not specifically call out
 22 Perfect 10’s reference to searches of the exact words “perfecttengallery” and
 23 “P102006” is irrelevant and cannot establish clear error or manifest injustice.

24 Moreover, Perfect 10’s reconsideration arguments regarding the alleged
 25 speed of processing of its sample notices also primarily rest on evidence that
 26 Perfect 10 raised only in connection with the parties’ summary judgment motions
 27 regarding the sufficiency of Perfect 10’s DMCA notices. These new arguments are
 28

1 procedurally improper and cannot justify reconsideration. *See Collins*, 2013 WL
 2 776244, at *1. Even if Perfect 10 had raised them, they would still fail.

3 First, Perfect 10 complained that “[n]owhere in the Order did the Court
 4 discuss any of the Sample Notices identified by Perfect 10 or Giganews, let alone
 5 specifically explain why any of these notices failed to comply with the notification
 6 requirements of Section 512(c)(3)(A) of the DMCA.” Motion at 18:18-22. But the
 7 Court need not discuss each of these sample notices separately to have addressed
 8 them. Under Perfect 10’s characterization of the notices and/or their undeniable
 9 content, the Court considered and rejected each of them:

- 10 • “Sample Notice 1 . . . asked Giganews to perform a search” Motion at
 11 16:4-5; Dkt. 449 (Perfect 10’s Motion for Partial Summary Judgment Re
 12 Sufficiency of Sample DMCA Notices) at 12.
- 13 • Sample Notices 2 and 3 “requested that Giganews perform searches.”
 14 Motion at 16:27-28; Dkt. 449 at 15, 16.
- 15 • Sample Notices 4 and 5 are screenshot/search notices. *See* Dkt. 449 at 17.
- 16 • Sample Notices 6-8 were illegible faxed notices that also requested that
 17 Giganews perform searches. *See* Dkt. 449 at 18, 19, and 20.
- 18 • Sample Notice A did not identify any Message-IDs. Motion at 18:2-5
 19 (admitting that the notice consisted of Perfect 10 images and “image
 20 identifiers”).

21 As discussed above, the Court considered and rejected screenshot/search notices
 22 and illegible faxed notices as noncompliant with the DMCA. Order at 10-13. And
 23 the Court found that Giganews *only* received proper notice where “Perfect 10
 24 provided legible Message IDs.” Order at 13. Thus, the Court rejected each of
 25 Perfect 10’s sample notices without having to discuss each notice separately. The
 26 alleged speed at which Perfect 10’s claims a service provider could process the
 27 sample notices is simply irrelevant, because the Court rejected each of the notices
 28 as inadequate.

1 *Second*, Perfect 10's new contention that it sent Giganews legible copies of
 2 its DMCA notices that it had earlier faxed to Giganews is equally unavailing.
 3 Those documents were not new or proper DMCA notices. As discussed above,
 4 Giganews cannot be required to search through thousands of pages of litigation
 5 document productions to identify "new and improved" copies of Perfect 10's
 6 DMCA notices. Nor can a new and more legible copy of a DMCA notice that
 7 Perfect 10's counsel sent to Giganews's counsel in connection with a pre-filing
 8 conference of counsel regarding summary judgment motions constitute a proper
 9 DMCA notice to Giganews. Perfect 10's Zada admitted that he refused to send
 10 replacement originals to Giganews when Giganews wrote him directly and asked
 11 for them. *See* Dkt. 443-21 (April 24, 2014 Zada Deposition Transcript) at 247:21.⁸
 12 Perfect 10 now claims that documents it produced in litigation should count as
 13 those replacements that Perfect 10 so obstinately refused to send. This approach is
 14 exactly the type of "gotcha" litigation gamesmanship that characterizes all of
 15 Perfect 10's litigation. With this motion for reconsideration, Perfect 10 tries a
 16 "gotcha" with the Court itself. Perfect 10 deserves no indulgence for its trickery.

17 *Third*, Perfect 10 argues *for the first time* that the Court's Order cannot apply
 18 to Sample Notice A because Perfect 10 sent such notice "before the automatic
 19 Message-ID extraction feature found in Mimo was created" and because "Giganews
 20 has not provided evidence that Message-IDs were available for any of the images in
 21 that notice when it was created." Motion at 18:2-3, 14-15. These arguments fail in
 22 the face of the very evidence that Perfect 10 cited in its Motion. Perfect 10
 23 admitted in the evidence it cited that Message-IDs were available and that
 24 Giganews requested in 2009 that Perfect 10 provide it with Message-IDs. Motion
 25 at 13:14-17 (citing Dkt. 550-2 (Declaration of Dr. Norman Zada in Opposition to

26
 27 ⁸ Indeed, the Court specifically addressed the evidence that Perfect 10 sent
 28 illegible fax notices, Giganews asked for legible copies, and Perfect 10 did not
 provide them. Order at 12.

1 Giganews's Motion for Partial Summary Judgment Re Inadequacy of Perfect 10
 2 Inc.'s Notices Under the Section 512 Safe Harbor) at ¶ 27, Ex. 6 ("In response to
 3 the notice [Sample Notice A], I received a letter from Giganews asking me to
 4 provide Message IDs or Message Headers").⁹ Perfect 10's new arguments are
 5 both procedurally improper and meritless, and they do not establish any grounds for
 6 reconsideration.

7 **F. The Court Did Not Commit Clear Error by Failing to Address**
 8 **Perfect 10's Other Arguments Regarding Actual or Constructive**
 9 **Knowledge.**

10 Perfect 10's remaining arguments are equally weak, because Perfect 10 failed
 11 to raise them in opposition to Defendants' summary judgment motion regarding
 12 indirect copyright infringement, even though they were available to Perfect 10:

- 13 • Perfect 10 argued that some of its sample images contain copyright notices,
 14 "which courts have found provide actual knowledge." Motion at 19:1-3.
 15 The cases that Perfect 10 cited involve *only* direct infringement and are thus
 16 irrelevant here. And this Court already rejected this argument when made by
 17 Perfect 10 in an earlier case: "In any event, Google is not obligated to comb
 18 through tens of thousands of images to determine which ones contain
 19 copyright notices. This would impermissibly 'shift a substantial burden from
 20 the copyright owner to the provider.'" *Perfect 10, Inc. v. Google, Inc.*, 2010
 21 WL 9479059 at *n.7 (citing *Perfect 10, Inc. v. CCBill*, 488 F.3d 1102, 1113
 22 (9th Cir. 2007)). Therefore, even if Perfect 10 had properly raised this
 23 argument in opposition to Giganews' summary judgment motion regarding
 24 indirect infringement—and it did not—the fact would not be material.

25
 26
 27 ⁹ In fact, Giganews's response letter both informed Perfect 10 that it could contact
 28 third party vendors that help copyright holders retrieve lists of Message-IDs, and
 28 provided contact information for those vendors. Dkt. 550-2 at ¶ 27, Ex. 6.

- Perfect 10 argued that “the Court also did not address evidence from *Ellison v. Robertson*, 357 F.3d 1072, 1077 (9th Cir. 2007).” Motion at 19:4-9. To the contrary, the Court addressed *Ellison* throughout the Order. See Order at 3, 4, 5, and 7. Perfect 10 failed to identify any material *facts* in this case that the Court overlooked. See Motion at 19:4-6 (stating that the Court overlooked *Ellison*, but failing to identify any facts here that the Court erroneously failed to address).

- Perfect 10's assertion that "the Court also did not address Perfect 10's evidence of willful blindness" (Motion at 19:9-10) is demonstrably false. The Court expressly addressed and rejected Perfect 10's argument and evidence regarding willful blindness. Order at 10 n.4 ("Perfect 10 also briefly cites the standard for 'willful blindness,' . . . [but] the evidence does not support a claim of willful blindness.").

Once again, Perfect 10's arguments are procedurally deficient, are factually wrong, and do not establish any clear error or manifest injustice that could justify reconsideration of the Court's Order.

III. CONCLUSION

This last-ditch, bad-faith effort by Perfect 10 to overturn yet another thoughtful and correct decision by this Court is baseless. The Court should deny Perfect 10’s motion for reconsideration and finally close the book on Perfect 10’s claims in this case.

Dated: December 8, 2014

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